DUSUN DESARU SDN BHD & ANOR

v.

WANG AH YU & ORS (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-1197-1998]
31 JANUARY 2000

LAND LAW: *Caveat - Private caveat - Private caveat lodged based on claim for balance of purchase price of shares - Whether claim thereof a claim in personam - Whether constituted a caveatable interest in land - National Land Code, s. 323(1) - Whether application for removal should be granted*

The plaintiffs applied for the removal of two private caveats lodged by the 6th defendant over two pieces of land ('the lands'). The 1st plaintiff was the proprietor of the lands whilst the 2nd plaintiff was the developer to construct several factory units on the lands. The 6th defendant, one of the former shareholders of the 1st plaintiff, lodged the private caveats for non-payment of the balance of the purchase price of shares that were sold to the 2nd plaintiff.

Held:

[1] A person or body who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest. A personal claim known as an *in personam* claim is enforceable against the registered proprietor and not the land itself and consequently, it is not caveatable.

[2] The 6th defendant was in error when he used the reason for the non-payment of the balance of the purchase price of the shares to lodge the private caveats on the lands. Firstly, that very reason was no longer in existence since the total purchase price had been fully paid for and secondly, that could not constitute a caveatable interest in land since it merely gave rise to an *in personam* interest.

[3] Under s. 327 of the National Land Code, both the plaintiffs had proved that they were aggrieved parties.

[4] The 6th defendant entered the private caveat in his personal capacity and thus, had no *locus standi* to enter them. There was also no affidavit evidence to suggest that the 6th defendant was given a mandate to enter the private caveats on behalf of all the shareholders or the board of

directors of the company. He entered them solely to frustrate the plaintiffs so that the purported balance of the purchase price was paid.

[5] The 1st defendant failed to disclose a caveatable interest under s. 323(1) of the National Land Code. As such, he failed to overcome the first of the three hurdles stated in *Goh Paik Swan v. Ng Choo Lum*, before the caveats might be permitted to remain on the register.

[Application allowed.]

Case(s) referred to:

Bachan Singh v. Mahinder Kaur & Ors [1956] MLJ 97 ***(refd)***
Citibank, NA v. Kwok Chee Loong [1988] 2 CLJ 758 ***(refd)***
Chai Kim Chong v. Barnwood Sdn Bhd [1994] 2 MLJ 56 ***(refd)***
Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Chai Kim Chong v. Barnwood Sdn Bhd [1994] 2 MLJ 56 ***(refd)***
Chia See Yin & Ors v. Yeoh Kooi Imm [1997] 5 CLJ 111 ***(refd)***
Chi Liung & Son Sdn Bhd v. Chong Fah & Sons Sdn Bhd & Anor [1974] 2 MLJ 211 ***(refd)***
Damodaran v. Vasudeva [1974] 1 MLJ 128 ***(refd)***
Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 ***(refd)***
EM Buxton & Anor v. Packaging Specialists Sdn Bhd [1987] 1 MLJ 342 ***(refd)***
Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***
Goh Paik Swan v. Ng Choo Lum [1996] 3 MLJ 347 ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325 ***(refd)***
Hj Yahya Yusoff & Anor v. Hassan Othman & Anor [1978] 2 MLJ 153 ***(refd)***
Jit Kaur v. Parl Singh [1974] 2 MLJ 199 ***(refd)***
K Sivapragasam Krishnan v. Renominium Development Sdn Bhd & 2 Ors [1998] 4 CLJ 481 ***(refd)***
K Sockalingam Mudaliar v. (1) MRM Ramasamy Chettiar, (2) A Veeramal [1938] 7 MLJ (FMSR) 237 ***(refd)***
Karuppiah Chettiar v. Mohamed Sharjudin & Anor [1971] 1 MLJ 41 ***(refd)***
Kasivisvanathan Chettiar v. Pereira [1976] 2 MLJ 110 ***(refd)***
Krishna Kumar v. United Malayan Banking Corporation Bhd [1983] 1 MLJ 106 ***(refd)***
Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd [1999] 2 CLJ 633 ***(refd)***
Lai Chon Foo @ Lai Chan Foo v. KN Wong (M) Sdn Bhd [1994] 1 CLJ 523 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 2 MLJ 53 ***(refd)***
Mahadevan & Anor v. Patel [1975] 2 MLJ 207 ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1986] 1 MLJ 315 ***(refd)***
Munah v. Fatimah [1968] 1 MLJ 54 ***(refd)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 ***(refd)***
N Vangedaselam v. Mahadevan & Anor [1976] 2 MLJ 161 ***(refd)***
Nanyang Development Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(refd)***

Ng Kheng Yeow v. Chiah Ah Foo & Ors [1987] 2 MLJ 330 ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd [1998] 2 CLJ Supp 96 ***(refd)***
Punca Klasik Sdn Bhd (No 2) [1996] 5 MLJ 92 ***(refd)***
Sing Eng (Pte) Ltd v. PIC Property Ltd [1990] 3 MLJ 129 ***(refd)***
Sing Lian Express Sdn Bhd v. Soh Kim Tee [1974] 2 MLJ 24 ***(refd)***
Standard Chartered Bank v. Yap Sing Yoke & Ors [1989] 2 MLJ 49 ***(refd)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
Tan Kit Theng v. RHB Finance Bhd & Ors [1999] 5 MLJ 533 ***(refd)***
Tee Chin Yong v. Ernest Jeff [1963] 29 MLJ 118 ***(refd)***
Woon Kim Poh v. Sa'amah Hj Kasim [1987] 1 MLJ 400 ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 MLJ 113 ***(refd)***
Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 98, 103(1)
National Land Code, ss. 43, 323(1)(a), (2), 324(1), 327(1)

For the plaintiffs - Mohd Fairuz Abdullah; M/s Sabaruddin Ali & Co
For the 6th defendant - Ng Chew Hor; M/s W J Chen & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This judgment is an offshoot of an earlier judgment that had since been reported *vide Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749, and for convenience it is referred to herein as the "first judgment". This judgment is confined to the joint application of both the plaintiffs for the removal of a private caveat lodged by Wang Boon Kang – the sixth defendant, on 5 September 1997 on two pieces of lands belonging to the first plaintiff comprised in HS (M) 790 PTD 17690 Mukim Plentong, district of Johor Bahru and GM 597 Lot 17661 Mukim Plentong, district of Johor Bahru. That joint application can readily be seen in encl. 5 where it sought for the following orders:

(1) The private caveat entered by the defendants through the sixth defendant over the first plaintiff's lands held under HS (M) 790 PTD 17690 Mukim Plentong, district of Johor Bahru and GM 597 Lot 17661 Mukim Plentong, district of Johor Bahru (hereinafter referred to as the "two pieces of lands") through presentation no: 1226/97 Jilid 21 Folio 169 dated September 5, 1997 be cancelled;

(2) The order to be made herein be registered on the register title of the land registry;

(3) the defendants are prohibited from entering a caveat on the first plaintiff's lands after the said order;

(4) A date to be fixed to assess the general damages suffered by the plaintiffs as a result of the entry of the caveat on the first plaintiff's lands; and

(5) That the costs of this application be borne by the defendants.

In the first judgment, I have alluded to the relevant affidavits in regard to encl. 5 and it would be ideal to reproduce that part of the first judgment (see p. 751 to p. 752 of the CLJ reporting):

> Enclosure 5 was supported by two affidavits. The first affidavit was deposed by Lim Nyuk Lan on 21 July 1998 as seen in enclosure 3, while the second was deposed by Chiang Kim Ming on 21 July 1998 as reflected in enclosure 4. Enclosure 7 was an affidavit deposed on 1 September 1998 by the sixth defendant and this served as a reply to enclosures 3 and 4. The sixth defendant further deposed another affidavit in enclosure 11 on 16 September 1998 as an additional affidavit to enclosure 7. It must be borne in mind that there was no reply to enclosure 7.

Both the plaintiffs brought into sharp focus in their intitulement in the originating summons as seen in encl. 5, s. 327(1) of the National Land Code, 1965 ("NLC"). It was an exercise in prudence to intitule the originating summons in the way it was done. In reliance to Gopal Sri Ram JCA's judgment in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, 477, I said in *Punca Klasik Sdn Bhd (No 2)* [1996] 5 MLJ 92, 99:

> By way of digression, I must say that the plaintiffs have intituled the originating summonses with the relevant provisions of the law. This was indeed a wise move. In this way, the defendant would not be caught off-guard and would know what to expect and would be able to mould their defences well in advance. The plaintiffs too would be shackled in that they cannot roam elsewhere by shifting from one rule to another or from one law to another, instead the plaintiffs will have no choice but to stick to their intitulement. In the long run the court too would benefit from the mandatory requirement that originating summonses should be intituled.

Facts Of The Case And The Law Thereto

As the owner of the two pieces of lands, the first plaintiff (Dusun Desaru Sdn Bhd) teamed up with the second plaintiff (Southsilk Technologies Sdn Bhd) by way of a joint venture to construct several factory units on the first plaintiff's lands. To realise the dream of building those factory units, the

second plaintiff as a developer secured a bridging loan from Wah Tat Bank Bhd and the second plaintiff has since started to repay the loan instalments together with the interests thereto.

Wang Boon Kang – the sixth defendant, the key figure in the whole episode, was said to be one of the former shareholders in the first plaintiff and together with five other former shareholders, they proceeded to file a civil suit *vide* no: 22-20-98 in the High Court of Johor Bahru against the second plaintiff for the recovery of the balance of the purchase price of the shares which were sold to the new shareholders in the first plaintiff's company. The sixth defendant lodged the private caveat on the two pieces of lands purely because of the dispute in regard to the balance of the purchase price of the shares that were sold to the new shareholders in the first plaintiff's company (see Form 19B of exh. "B12" of encl. 3 and the statutory declaration as seen in exh. "B13" of encl. 3). Form 19B is a statutory form mentioned in s. 323(2) of the NLC. The whole text of s. 323 of the NLC reads as follows:

> (1) The persons and bodies at whose instance a private caveat may be entered are –
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficiary entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b)
>
> (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.
>
> (3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor.

and it sets out the categories of persons or bodies who may enter private caveats. Precisely put, not every person or body can enter a private caveat; only a person or body having a caveatable interest in the land is entitled to lodge a private caveat. It is a correct statement of the law to state and I so state that a person or body who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest.

Section 43 of the NLC sets out the persons or bodies who may deal in alienated land and it enacts as follows:

> Subject to the provisions of Part Thirty-Three (A), the powers of disposal conferred on the State Authority by section 42 may be exercised only in favour of, and applications for the exercise may be accepted only from, the following persons and bodies –
>
> (a) natural persons other than minors;
>
> (b) corporations having power under their constitutions to hold land;
>
> (c) sovereigns, governments, organizations and other persons authorised to hold land under the provisions of the Diplomatic and Consular Privilege Ordinance, 1957;
>
> (d) bodies expressly empowered to hold land under any other written law;
>
> Provided that it shall not be necessary for a corporation to have power to hold land in order for it to be able to apply for, and be issued with, a permit to extract and remove rock material.

Reverting back to s. 323(1)(a) of the NLC, the phrase "registrable interest in, any alienated land" gives the holder thereof a legal right to make a substantive entry on the register. Thus, a purchaser of a piece of land and who has paid the purchase money in full is said to hold a registrable interest. Whereas the word "title" appearing in s. 323(1)(a) of the NLC refers to ownership of the land. Seen in its correct perspective and applying the Torrens principles, the phrases "title to" and "registrable interest" as employed in s. 323(1)(a) of the NLC would refer to the following scenarios:

(i) a claim to an ownership of the land as envisaged in the case of *Munah v. Fatimah* [1968] 1 MLJ 54 and this kind of claim is capable of being protected by a private caveat; and

(ii) a claim to a registrable interest which is capable of being protected by a private caveat.

A personal claim or better known as an in personam claim is enforceable against the registered proprietor and not the land itself and consequently it is not caveatable. In rem claim which relates to an interest capable of registration can be caveated (see *Bachan Singh v. Mahinder Kaur & Ors.* [1956] MLJ 97).

The courts have been very active and over the years have crystallised the law in such a way that one can now easily identify whether a person or a body has a caveatable interest in the land or otherwise. Caveatable interests in lands are said to exist in the following fact situations:

(1) where a purchaser of a piece of land has in his possession a valid legal agreement to substantiate his purchase (*Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 2 MLJ 53);

(2) where an undivided share in a piece of land is being sold to a purchaser and that purchaser merely holds a transfer in registrable form without being in possession of the issue document of title (*Karuppiah Chettiar v. Mohamed Sharjudin & Anor.* [1971] 1 MLJ 41);

(3) the assignee's interest to a piece of land despite the fact that the vendor has no knowledge of the existence of the assignee (*Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145);

(4) the claim of a party to a co-proprietorship of a piece of land which hinges on a disputed signature that appears on a letter (*Damodaran v. Vasudeva* [1974] 1 MLJ 128);

(5) an administrator of an estate who claims that the deceased should have been registered as the proprietor of the land (*Jit Kaur v. Parl Singh* [1974] 2 MLJ 199);

(6) an option holder exercising his option in a situation where the owner of the land disputed the claim of the option holder (*Sing Lian Express Sdn Bhd v. Soh Kim Tee* [1974] 2 MLJ 24) ;

(7) the caveator alleges that he has purchased the land but the proprietor of the land disputes the allegation and says that the caveator is only a tenant (*Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110);

(8) the caveator alleges that the land has been fraudulently transferred to the registered proprietor (*Chi Liung & Son Sdn Bhd v. Chong Fah & Sons Sdn Bhd & Anor* [1974] 2 MLJ 211);

(9) an unregistered chargee making a claim to the piece of land (*K Sockalingam Mudaliar v. (1) MRM Ramasamy Chettiar, (2) A Veeramal* [1938] 7 MLJ (FMSR) 237; and *Mahadevan & Anor v. Patel* [1975] 2 MLJ 207);

(10) an equitable chargee claiming an interest in the land but the court holds his interest to be that of a lien (*Standard Chartered Bank v. Yap Sing Yoke & Ors* [1989] 2 MLJ 49);

(11) a former proprietor of the land who seeks to retransfer the land in accordance to the terms of the contract (*Woon Kim Poh v. Sa'amah bte Hj Kasim* [1987] 1 MLJ 400);

(12) the purchaser who purchases the land knowing that the land is subject to a charge and he later pays off the chargee bank (*Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 MLJ 330);

(13) the second chargee who claims a title to the land when the first chargee had agreed to consent to the claimant's charge but the second chargee later changes his mind and refuses to do so (*Krishna Kumar v. United Malayan Banking Corporation Bhd* [1983] 1 MLJ 106); and last but by no means least

(14) the beneficiary of a wakaf land as envisaged in *Hj Yahya Yusoff & Anor v. Hassan Othman & Anor* [1978] 2 MLJ 153.

It would be germane to refer to the decision of Siti Norma Yaacob J (now JCA) in *EM Buxton & Anor v. Packaging Specialists Sdn Bhd* [1987] 1 MLJ 342. In that case her Ladyship had to deal with the following set of facts. There the caveator had initially agreed to purchase the caveated land but later defaulted and in that event the deposit was forfeited. The caveator simply refused to continue with the contract because 56% of the land had been acquired and the caveator argued that the deposit ought not to be forfeited and he sought for the return of the deposit in question. The proprietor of the land, on the other hand, was interested in removing the caveat and it was argued that the caveator had no caveatable interest. The caveator argued that his interest revolved on an unsecured debt and it arose out of a land transaction and therefore he had the right to caveat the land since he had a caveatable interest. At p. 344 of the report, her Ladyship succinctly said that the respondent was:

> ... seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is not claiming specific performance of the agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred. To that end, it cannot be said that it had any interest in the land capable of being registered. As the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was no longer interested to acquire such interest, it cannot insist that the caveat be allowed to remain. From the nature of its civil suit, the respondent has only a claim in personam against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim. Admittedly, such a claim originated from the agreement but it is not capable of being registered under our Torrens system of registration.

In the context of the present case, as alluded to earlier, Wang Boon Kang – the sixth defendant, merely wanted to lodge the private caveat on the two pieces of lands in his desire to ensure that the balance of the purchase price

of the shares that were sold to the new shareholders in the first plaintiff's company would remain intact and recoverable. That would, in the words of Siti Norma Yaacob J (now JCA) in the case of *EM Buxton & Anor v. Packaging Specialists Sdn Bhd (supra)*, simply be "a claim in personam" and therefore not caveatable. To me, the in personam interest cannot be caveated because it is not registrable.

I must now narrate the facts of the present case in some detail especially in regard to the purchase price of the shares in the first plaintiff's company. There was evidence that the former shareholders of the first plaintiff sold RM3.3. million worth of its shares to the second plaintiff as evidenced by a sale and purchase agreement dated 26 January 1996 as exhibited in exhibit marked "A9" of encl. 4. There was also evidence to show that the sum of RM2,953,371.38 had been accepted by the former shareholders of the first plaintiff as evidenced by letter dated 12 October 1996 emanating from Messrs Chun & Co, the solicitors of the former shareholders of the first plaintiff, as seen in exhibit marked "A7" of encl. 4. By the very same letter, there was also confirmation that the sum of RM591,228.78 had been paid to the former shareholders of the first plaintiff based entirely on the cash per share value of the shares in question. Earlier on, the deposit of the sum of RM330,000 had already been paid to the former shareholders of the first plaintiff and such payment had been duly acknowledged receipt upon the execution of the sale and purchase agreement as reflected in cl. 2 of exhibit marked "A9" of encl. 4. Then there was also a written confirmation signed by Wang Boon Kang – the sixth defendant, together with the other former shareholders to indicate that they have no outstanding claims thereto. The document was addressed to the directors of the first plaintiff and it was worded as follows (see exh. "A12" of encl. 4):

> We being all the creditors and shareholders of Dusun Desaru Sdn Bhd hereby confirm that we have received in full all the amounts shown against our names in the Audited Accounts as at 10th August 1996.
>
> We also confirm that we have no claims outstanding against the company whether for compensation for loss of office or otherwise howsoever.

Another damning piece of evidence would be this. Wang Boon Kang and the other former shareholders of the first plaintiff have executed Form 32A under s. 103(1) of the Companies Act 1965 in regard to the transfer of those securities on 11 October 1996 upon receipt of the full payment as exemplified in exhibit marked as "A13 (a) – (i)" of encl. 4 thereof. According to s. 98 of the Companies Act 1965 "the shares or other interest of any member in a company shall be moveable property, transferable in the manner provided by

the articles, and shall not be of the nature of immovable property." In short, shares are transferable in the manner as provided by the articles thereto. In the context of s. 103 of the Companies Act 1965, a "transfer" simply means a transfer of legal title to the shares (*Sing Eng (Pte) Ltd v. PIC Property Ltd* [1990] 3 MLJ 129). These brief recitals of the facts would show beyond per adventure that the total purchase price of the shares had been disbursed and there was thus no basis at all for Wang Boon Kang – the sixth defendant, to allege that there was still an outstanding balance of the purchase price of the shares due and forthcoming. In my judgment, Wang Boon Kang was in error when he used the reason for the non-payment of the balance of the purchase price of the shares to lodge the private caveats on the two pieces of lands because, firstly, that very reason was no longer in existence since the total purchase price had been fully paid for and, secondly, of crucial importance would be the fact that that very reason cannot, in law, constitute caveatable interest in land since it merely gives rise to an in personam interest.

Essentially the caveator who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest thereto. The reason advanced by Wang Boon Kang – the sixth defendant, no where came near to the requirements of the law. It is interesting to note, that under s. 324(1) of the NLC, the registrar's duty when confronted with an application for an entry of a private caveat is purely administrative or ministerial in nature (*N Vangedaselam v. Mahadevan & Anor* [1976] 2 MLJ 161; *Tee Chin Yong v. Ernest Jeff* [1963] 29 MLJ 118, 119; *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 and *T Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 at 270). That being the case, the registrar is not duty bound upon receipt of an application for an entry of a private caveat to enquire into the validity of the claims of the prospective caveator. The validity or otherwise of the prospective caveator's claims can only be decided by the High Court.

The Issue And The Law Thereto

The question that begs to be answered is this: Should the private caveats on the two pieces of lands be cancelled?

Section 327 of the NLC enacts as follows:

> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.

(3) Every cancellation under sub-section (2) shall be signed and sealed.

and it certainly vests this court with the statutory power to cancel the private caveats in question. This was indeed a unique case. Both the plaintiffs were jointly aggrieved by the existence of the private caveats on the two pieces of lands. The first plaintiff proudly declares to the whole world at large, so to speak, that as the registered proprietors it had *prima facie* the unfettered right to deal with the two pieces of lands. The second plaintiff as a developer of the several factory units that would be built on the two pieces of lands rightly held onto the notion that they would suffer loss if the private caveats were not removed. It would be correct to say that the second plaintiff who has a legal and a beneficial right over the two pieces of lands would be aggrieved by the presence of the private caveats. Indeed, the second plaintiff was unable to sell the factory units by the very presence of the private caveats. In every sense of the word, the second plaintiff just like the first plaintiff was an aggrieved party. To add salt to the wound, the contractor for the construction of the factory units had sent a notice dated 17 June 1998 to the second plaintiff for the "unpaid overdue progress claims" that were still outstanding (see exhibit marked "A26" of encl. 4). The sting of the caveat has been described by Lord Diplock in the Privy Council in the case of *Eng Mee Yong & Ors v. V. Letchumanan* [1979] 2 MLJ 212, 214 in these refined words:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law. By section 322 (2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.
>
> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved.

and the sting of the private caveats on the two pieces of lands have aggrieved both the present plaintiffs. Mokhtar Sidin JCA writing for the Court of Appeal in *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 2 MLJ 487 thereby confirming my earlier decision (see [1995] 3 MLJ 6) and after examining the facts and the law concluded at p. 501 to p. 502 of the report:

> Accordingly, I hold that the respondent was *bona fide* purchaser for valuable consideration and that he was an aggrieved person entitled to make his application to the court under section 327 (1) of the Code for the removal of Goh's caveat and Ho's caveat (see *AG of the Gambia v. Pierre Sarr N'Jie* [1961] AC 617 and *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45).

His Lordship Mokhtar Sidin JCA's decision was aptly worded in the headnote thereto and there the headnoter summarised it at p. 489 of the report in these words:

> The word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.
>
> In this case, it was clear from the evidence given that the full purchase money for the land had been paid by the respondent to Long. The relevant transfer under the Code in respect of the land duly executed by Long in favour of the respondent was given to the respondent together with the issue document of title for the land. Long had done everything he could as registered proprietor to transfer or divest his entire interest in the land to the respondent. Thus, Long had thereby become a bare trustee holding the bare legal title to the land on trust for the respondent who had become the beneficial owner thereof. Further, the respondent had no reason to disbelieve Long whose assurance he had relied upon.
>
> Accordingly, the respondent was a *bona fide* purchaser for valuable consideration and therefore he was an aggrieved person entitled to make his application to the court under s. 327(1) of the Code for the removal of Goh's caveat and Ho's caveat (see pp 499F-G, I, 500D-E, 501H-I and 502A); *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 MLJ 330, *Yeong Ah Chee v. Lee Chong Hai & Anor* [1994] 2 MLJ 614, *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12 and *AG of Gambia v. Pierre Sarr N'Jie* [1961] AC 617 followed.

On affidavit evidence and the documents annexed thereto, both the plaintiffs have proven that they were the aggrieved parties and the onus would now be shifted to the caveator – namely, Wang Boon Kang to satisfy this court, on the available affidavit evidence, that he has a caveatable interest to protect. Indeed if it was true that Wang Boon Kang had a caveatable interest to protect then he would qualify to lodge the private caveats on the two pieces of lands. In *Chia See Yin & Ors v. Yeoh Kooi Imm* [1996] 2 MLJ 494, 502, I had this to say:

> Has the defendant a caveatable interest?
>
> Since the plaintiffs are the registered proprietors of the land, the onus of proof that the caveat should remain lies on the defendant caveator. In this regard, reference may be made to the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (FC), where Hashim Yeop Sani FJ (as he then was) in explaining the nature of the onus said (at p 115):
>
> > If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered title is *prima facie* evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the main action.
>
> His Lordship Hashim Yeop Sani FCJ (as he then was) proceeded further to say that (at the same page):
>
> > To put it more simply, the caveator in this case must first satisfy the court that he has a 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s. 323 of the National Land Code.
>
> Recently, the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782 adopted the principles as enunciated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 in an application for removal of caveat under s. 327(1) of the National Land Code 1965 ('the NLC'). Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal in *Murugappa Chettiar Lakshmanan*, had this to say (at pp 788-789):
>
> > First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in

> support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

In another part of his judgment, his Lordship Gopal Sri Ram JCA said (at pp 789-790):

> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A *fortiori*, he has no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

and this meant that the onus of proof that the private caveats should remain lie squarely on the caveator Wang Boon Kang. But unfortunately, as alluded to in the early part of this judgment, the reason for lodging the private caveats was non existent because the full purchase price had been disbursed and on top of that the reason merely gave rise to a personal claim, if at all, against the registered proprietor but not in regard to the two pieces of lands in question. In my judgment, the caveator Wang Boon Kang had no caveatable interest to protect at all and the private caveats should be cancelled forthwith.

A perusal of the civil suit *vide* no: 22-20-98 filed in the High Court of Johor Bahru by Wang Boon Kang and five other former shareholders would show that it was specifically targeted at the second plaintiff. It was a claim for the balance of the purchase price allegedly not paid to them. It was a monetary claim against the second plaintiff and not against the registered proprietor of the two pieces of lands in question, namely, the first plaintiff. It was, pure and simple, a monetary claim that had nothing to do with the two pieces of lands. It was an abuse of the caveator Wang Boon Kang to enter the private caveats. It was an act that threw the caveat procedure to the wind and it is here that this court must be vigilant because the caveat procedure has been described to be:

> ... an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument (*Miller v. Minister of Mines* [1963] AC 484 at p. 487).

A monetary claim against the second plaintiff cannot in law constitute a "registrable interest" under s. 323(1)(a) of the NLC. The phrase "registrable interest" has a special meaning and it should not be diluted nor corrupted by any transaction outside the NLC. At this juncture, I propose to cite a few

authorities that would certainly be in favour of both the plaintiffs. For starters, it would be the case of *Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd* [1998] 5 MLJ 709 where it involved the sale of two pieces of lands by way of selling all the issued and fully paid up shares in two companies for the sum of RM38 million. The defendant failed to pay the sum RM660,000 to make up the required 2% as earnest deposit and the defendant then lodged a private caveat against one piece of land only. The plaintiff then applied by way of originating summons to remove the private caveat and the court allowed the plaintiff's application. Low Hop Bing J sets out the particulars in the statutory declaration which supports the application for entry of the private caveat at p. 718 of the report in these words:

> The grounds of application for the entry of the private caveat are stated in the statutory declaration affirmed by one Francis Lim Chiew Kwee who affirmed in para 2 thereof that the agreement is for the purchase of all the issued and fully paid up shares in the plaintiff but the total price is not disclosed therein.

His Lordship then continued to say at the same page of the same judgment:

> There must exist a valid agreement for the sale of land so that the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement: *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 2 MLJ 53 at pp 54 and 55.
>
> In cases in which the removal of a private caveat is called into question, the subject matter to be protected is land and not, eg purchase of shares. So where the caveat was entered by a purchaser pursuant to a sale and purchase of land, the caveat was allowed to remain: *Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110 (FC) and *Malite Sdn Bhd v. Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29 (FC).
>
> The Federal Court in *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 and the Court of Appeal in *Kho Ah Soon v. Duniaga Sdn Bhd* [1996] 2 MLJ 181 also emphasised that the essential subject matter therein was land as opposed to shares in a company.

Continuing on the same page and spilling over to p. 719, his Lordship continued:

> Even by stretching one's imagination to the furthest to uphold the contention of the defendant that sale of the entire shares in the two companies is synonymous with the sale of the said lands owned by these two companies, the fundamental question is still whether this fact gives rise to a registrable interest in order to entitle the defendant to enter the private caveat.

His Lordship then rounded up by saying at the last paragraph of p. 719:

> By reason of the above, I hold that the defendant's entry of the private caveat is wrongful as the defendant had not disclosed a caveatable interest in its application (Form 19B) under s. 323(1) of the NLC. Hence the defendant is unable to cross the first hurdle. I order that the private caveat be hereby removed forthwith, without the necessity of going further. I also make a consequential order that damages be awarded to the plaintiff, to be assessed by the registrar of this court. Costs to be taxed and paid by the defendant to the plaintiff.

It would be apparent that an interest in shares of a company would not give rise to a registrable interest capable of being protected by an entry of a private caveat under s. 323(1) of the NLC; and the present case is no exception.

Next, it would be the case of *Lai Chon Foo @ Lai Chan Foo v. K.N. Wong (M) Sdn Bhd* [1994] 1 CLJ 523, a decision of Abdul Kadir Sulaiman J. There the court was confronted with a question of whether a promissory note gave rise to caveatable interest. The plaintiff in that case took a loan from the defendant and executed a promissory note in favour of the defendant wherein as security the defendant was given permission to caveat the plaintiff's land. After hearing arguments, the court held that the promissory note did not create any equitable charge over the plaintiff's land in favour of the defendant nor did it confer upon the defendant any caveatable interest in the land. The defendant therefore, according to the court, had no legal standing to caveat the plaintiff's land. The court was also of the view that the promissory note was only a document concerning payment of a debt by the plaintiff to the defendant and that it was not a document relating to the transfer of the plaintiff's land nor was it a document evidencing title to the plaintiff's land. At p. 525 to p. 526 of the report, Abdul Kadir Sulaiman J observed that:

> A caveat is merely a weapon provided to protect rights or interests in land and not an instrument which creates that rights or interests. It is not sufficient that a caveat be lodged or allowed to remain on the title solely because in some ways it is advantageous to the caveator as in this case solely for the purpose that the dealing in the said land be hampered for so long as the debt due by the plaintiff is not settled.

and it would appear that Wang Boon Kang – the sixth defendant, was adopting the same *modus operandi*. Wang Boon Kang merely wanted to hamper the dealings in regard to the two pieces of lands as he thought that the balance of the purchase price had not been paid.

This would be followed by the case of *Chai Kim Chong v. Barnwood Sdn Bhd* [1994] 2 MLJ 56. In that case, Richard Malanjum J held that the balance of the purchase price in a transaction was not sufficient to create a caveatable interest. His Lordship further held that owing the balance of the purchase price was merely a right in personam against the plaintiff and not a right in rem in relation to the land. In so deciding the way he did, his Lordship vigorously applied the decision of Hashim Yeop A. Sani FJ (as he then was), a brilliant judge of his era and whose brilliance still shines till today, in the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113, 116 column ID-E. There that brilliant judge aptly said:

> It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land.

Muhammad Kamil J in *Tan Kit Theng v. RHB Finance Bhd & Ors* [1999] 5 MLJ 533 was right when he held that two actions pending in court were not sufficient to clothe the plaintiff with a caveatable interest.

Shaik Daud JCA in *Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537 at p. 540 aptly said:

> It is trite law that a claim for a mere debt cannot give rise to a caveatable interest.

Further down the same page, his Lordship continued to say that:

> Recently this court in *Trans-Summit Sdn Bhd v. Chun Nyook Lin (P)* [1996] 2 MLJ 247 held that a mere monetary claim cannot give rise to a caveatable interest over land.

Yet another case worthy to mention would be the case of *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189, a decision of another brilliant judge by the name of Mohamed Azmi SCJ. That was a case where the appellant had purchased a terrace house from a building company of which the respondent was the managing director. The appellant claimed that she had paid the purchase price for the property and an instrument of transfer had been executed by two of the directors of the company. But unfortunately, the appellant could not register the transfer as there was a private caveat entered by the respondent on the land. The appellant applied for the removal of the caveat. The learned trial judge dismissed her application and she forthwith appealed to the Supreme Court. The appeal was allowed by the Supreme Court who held that the private caveat was entered by the respondent under s. 323 of the NLC in his own

name for the express purpose of protecting his personal interest which can only mean that he had done so as a shareholder or on behalf of all the shareholders of the company. At p. 198 of the report, Mohamed Azmi SCJ in fine style said:

> In this appeal, we must not lose sight of the fact that the company is the registered proprietor of the land under caveat, and it is the company that sold the property to the appellant at a price of $35,000. The company has in fact handed to the appellant not only the instrument of transfer but also the document of title for necessary registration. In such circumstances, it is impossible to envisage how the managing director either personally or as a shareholder or as an officer of the company, can be said to have a caveatable claim to title or registrable interest under s. 323(1) merely because of internal squabbles between him and certain directors of the company.

and likewise, in the present case, Wang Boon Kang was a former shareholder and it was certainly impossible for him to have a caveatable interest over the two pieces of lands.

Then there is a case of *Citibank, N.A. v. Kwok Chee Loong @ Kok Chee Leong* [1988] 2 CLJ 758, a decision of Siti Norma Yaakob J (now JCA) where her Ladyship held that since the respondent as a shareholder was only entitled to receive dividends and to vote at meetings convened by Tajob Realty Sdn Bhd, then the respondent did not have a registrable interest under s. 323 of the NLC.

Next, it would be the case of *K. Sivapragasam Krishnan v. Renominium Development Sdn Bhd & 2 Ors* [1998] 4 AMR 4175, 4197 where Mokhtar Sidin JCA held:

> In the present appeal, it is clear to us that the appellant as an ordinary member or a member of the Executive Council of the union was never given the mandate to enter the caveat. We are of the opinion that he has no interest whatsoever on the said property and as such he has no *locus standi* to enter that caveat. Further, we have examined Borang 19B (at page 117 of the record) and found that when he made the application, he was acting in his personal capacity. That being the case the first respondent was right in raising the objection as to the *locus standi* of the appellant. For the reasons stated above the appellant's appeal should be dismissed with costs.

and in the present case, an examination of form 19B as seen in exh. "A23" of encl. 4 would categorically show that Wang Boon Kang entered the private caveats in his personal capacity and that being the case, he had, in my judgment, no *locus standi* to enter that private caveats. Incidentally, there was also no affidavit evidence to suggest that Wang Boon Kang was given a mandate to enter the private caveats on behalf of all the shareholders or the

board of directors of the company. Bereft of such evidence, the irresistible conclusion was that Wang Boon Kang entered the private caveats on the two pieces of lands solely to frustrate both the plaintiffs unless the purported balance of the purchase price was paid.

Reference should also be made to the case of *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1986] 1 MLJ 315. In that case, there was an *ex parte* application for the extention of a private caveat which had been lodged by the applicant against the land belonging to the respondents. At p. 317 of the report, Shankar J (as he then was) remarked:

> Consequently it seems to me that this is not a case where the caveator has satisfied me on the evidence presented to this Court that he has a claim to an interest in the land, or that such a claim raised a serious question to be tried, let alone going on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action which the applicant filed on November 29, 1984. (See *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212)
>
> In all the circumstances it is clear to me beyond a peradventure that this is not a proper case for the extension of the caveat and it should therefore be removed.

and it would be difficult, in the context of the present case, to determine what sort of "interest in the land" would Wang Boon Kang have bearing in mind that he was only concerned on the purported balance of the purchase price of the shares and not the two pieces of lands.

I must proceed further and I must apply the propositions of law propounded by *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 and *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782. In the words of Gopal Sri Ram JCA in *Goh Paik Swan v. Ng Choo Lum* [1996] 3 MLJ 437, "the three hurdles which a caveat must surmount before it may be permitted to remain upon the register" may be stated thus (see p. 444 of the report):

> The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

and from the available evidence, Wang Boon Kang would miserably fail in the first test and there was thus no necessity at all to proceed with the second test nor the third test. The sixth defendant – Wang Boon Kang, had no caveatable interest at all and what he did will not be sanctioned by this court. I have no hesitation to cancel the private caveats on the two pieces of lands.

For the reasons adumbrated above, I gave an order in terms of encl. 5, paras. (1), (2), (3) and (5) thereof. I too gave an order that damages ought to be assessed by the senior assistant registrar ('SAR') under prayer (4) of encl. 5 on a date to be fixed by the SAR.